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in the bond as to the terms of the loan were material and false, relieving the surety from liability, unless he had notice of the true character of the loan.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 82-85; Dec. Dig. § 39.\* 13 Va.-W. Va. Enc. Dig. 11.]

**5. Principal and Surety (§ 162\*)—Contracts Secured—Contract of Suretyship—Variance.**—Whether a surety in a bond given by a borrower had notice of the true character of the loan, notwithstanding the false and material recitals in the bond as to the terms of the loan, is for the jury.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. § 443; Dec. Dig. § 162.\* 13 Va.-W. Va. Enc. Dig. 11, 12; 5 id. 351.]

**6. Principal and Surety (§ 108\*)—Discharge of Surety—Change in Contract.**—The surety in a bond given by a corporation borrowing money for the construction of a hotel, conditioned on the completion of the building before a designated date free from mechanics' lien, is not discharged from liability because of an agreement, without consideration, between the lender and the corporation, that the money loaned is only to be had as the corporation needs it for the building, though the lender has in his hands over one-tenth of the money agreed to be loaned when the bond sued on was forfeited.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 213-218; Dec. Dig. § 108.\* 13 Va.-W. Va. Enc. Dig. 18, 19, 30, et seq.]

Error to Law and Chancery Court of City of Norfolk.

Action by the Union Trust & Title Corporation against the Atlantic Trust & Deposit Company and another. There was a judgment for plaintiff against defendant Atlantic Trust & Deposit Company, and it brings error. Reversed and remanded.

*Jeffries, Wolcott & Lankford and Floyd Hughes*, for plaintiff in error.

*Thomas H. Willcox, E. H. Bilisoly, Richard D. Cook*, and *Walter H. Taylor*, for defendant in error.

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VIRGINIA & K. RY. CO. *v.* HENINGER.

Sept. 9, 1909. Rehearing Denied March 10, 1910.

[67 S. E. 185.]

**1. Contracts (§ 170\*)—Construction—Construction by Parties.**—Where the provision of an excavating contract, providing the method of measuring the material excavated, was ambiguous, the practical construction placed upon it by the parties was entitled to great con-

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\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

sideration in construing the contract, especially where the commissioners found that the method contended for by defendant had never been used and was impracticable.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 170.\* 3 Va.-W. Va. Enc. Dig. 401, et seq.]

**2. Appeal and Error (§ 266\*)—Exceptions—Necessity—Report of Commissioners.**—Any error of the commissioners in failing to allow for shrinkage of earth in measuring fills, in an action upon an excavating contract, cannot be first urged on appeal, where the finding of the commissioners was not excepted to on that ground; such error not appearing on the face of the report.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1552-1571; Dec. Dig. § 266.\* 1 Va.-W. Va. Enc. Dig. 565, et seq.; 11 id. 735, 757.]

**3. Appeal and Error (§ 1022\*)—Findings of Commissioners—Conclusiveness—Approval by Court.**—Where it is not clear that the commissioners, whose finding was approved by the court, erred in allowing plaintiff solid rock prices, instead of earth prices, for removing certain material, the court on appeal will not disturb such finding.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015-4018; Dec. Dig. § 1022.\* 11 Va.-W. Va. Enc. Dig. 757, 758.]

**4. Contracts (§ 300\*)—Time of Performance—Extension.**—Changes in an excavation contract, which required more work to be done, made after the original contract was executed, necessarily gave the contractor the right to further time for its completion.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1379; Dec. Dig. § 300.\* 13 Va.-W. Va. Enc. Dig. 979.]

Appeal from Circuit Court, Wise County.

Action by A. J. Heninger against the Virginia & Kentucky Railway Company. From a judgment for plaintiff, defendant appeals, and plaintiff assigns cross-errors. Affirmed.

*Bond & Bruce* and *Vicars & Peery*, for appellant.

*W. H. Werth* and *Ayers & Fulton*, for appellee.

#### LETTERMAN v. CHARLOTTESVILLE LUMBER CO.

March 10, 1910.

[67 S. E. 281.]

**1. Trial (§ 343\*)—Issue on Plea in Abatement—Effect of Verdict Thereon.**—A verdict on issues raised by a plea in abatement for the nonjoinder of a defendant, establishing that the contract, for breach of which plaintiff sought to recover damages, was made with defendant

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\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.